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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>FELIPE SANCHEZ AVILA,<br>Defendant and Appellant. | E048042<br>(Super.Ct.No. RIF133548)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed with directions.

Doris M. Frizzell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

## I. Introduction[1]

A jury convicted defendant Felipe Sanchez Avila of 31 counts of repeatedly molesting his two daughters, N. and M., when they were growing up. The court sentenced him to an indeterminate term of 210 years to life, plus a determinate term of 92 years eight months.

On appeal, defendant challenges his convictions on counts 11 through 21 involving N. We affirm the judgment but order the abstract of judgment be corrected to state the proper sentence of 210 years to life and 92 years eight months, instead of the incorrect sentence of 120 years to life and 88 years.

## II. Factual and Procedural Background

### a. Preliminary Hearing

Defendant was originally charged in a felony complaint with six sexual offenses involving two victims. (§§ 288, subd. (a), 289, subd. (a)(1).) At his felony arraignment in December 2006, he pleaded not guilty to nine sexual offenses. (§§ 288, subds. (b) and (c), 289, subd. (a)(1).)

At the preliminary hearing in April 2007, Riverside police detective, Kimberly Boemia, testified that she investigated the allegations against defendant.

Defendant's daughter, N., was born in November 1983. She told the detective defendant had begun molesting her in 1993 or 1994 when she was 10 years old. He fondled her breasts and genitals over and under her clothes. The molestations occurred

[1] All statutory references are to the Penal Code unless stated otherwise.

once or twice a week until she turned 14. When N. was between ages 14 and 18, defendant began having intercourse, including oral copulation, with her. The intercourse occurred between 10 and 20 times.

Detective Boemia interviewed M., the younger daughter, when she was 14 years old. M. was born in June 1991. M. specifically remembered acts of molestation occurring when she was nine years old. Defendant came into her room while she was sleeping. He gripped her hand and used it to rub his penis for 10 to 15 minutes. Next he came into her room at night and rubbed her breasts and genitals.[2] Similar conduct occurred five or six times until she was 12 years old.

Additional, similar incidents occurred when M. was 14 years old after the family moved to Riverside county. One particular incident occurred during the day when the rest of the family was shopping. On another occasion, one Tuesday night in September or November 2006, instead of taking M. to attend catechism classes, defendant took her to the Lido Motel in Colton. He touched her breasts, put her on the bed, and proposed they have intercourse. She refused and he became angry and threatened to take away her phone.

A few days after the motel incident, defendant entered M.'s bedroom and began kissing her, fondling her breasts, and rubbing her genitals. After lubricating his fingers, he penetrated her vagina.

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[2] The word "vagina" is consistently misused when it is clear from the context that the proper reference is genitals or genitalia.

B. 32-Count Information

After Detective Boemia's testimony, the prosecutor sought to file an information alleging 32 counts, occurring in Riverside and San Bernardino counties. Counts 1 through 10 involved conduct with M. Count 8 was the forcible penetration of M. (§ 289, subd. (a)(10.) Counts 11 through 21 involved lewd conduct with N. when she was under 14 years of age. (§ 288, subd. (a)(1).) Counts 22 through 32 were based on 11 instances of unlawful sexual intercourse with N. (§ 261, subd. (a)(2).)

The court permitted the prosecutor to file an amended pleading with six counts, subject to later amendment. In June 2007, defendant pleaded not guilty to all charges. After many continuances, the trial began in February 2009 based on the 32 counts.

C. Prior Acts

Defendant's former stepdaughter, C., reported to a police investigator that when she was about 13 years old in the early 1990's, defendant forcibly raped her about 10 times.

D. Testimony of M.

M. was 17 years old when she testified at trial. When she was eight or nine years old, while she was sleeping, defendant used her hand to compel her to masturbate him. She was afraid he would hit her if she resisted. On other occasions when she was about 13 years old, defendant would come into her room at night and touch her breasts and genitals under her clothes. Once or twice he digitally penetrated her vagina using lubrication. Another time when she was 15 he took her to a hotel instead of catechism classes. He began to touch her breasts and then put her on the bed but she refused to let

him remove her clothes. Defendant was angry but desisted. He warned her not to tell anyone.

When M. was between 12 and 14 years old, defendant left her alone because M. had confided to N. who threatened defendant if he did not stop. M. finally told a friend and then reported defendant to a school counselor.

E. Testimony of N.

At trial, N. testified she was born in 1983. When she was 11 or 12, defendant began touching her breasts and genitals. There were two or three instances of intercourse, which occurred at a hotel. N. confronted defendant after M. revealed to N. that defendant had been touching M.

In October 2006, before testifying at trial, N. had told a police detective, Stephen Pounds, that her father had molested her. When she was 10 years old, he fondled her breasts and genitals, both over and under her clothes. She also stated her father had sexual intercourse with her "twice a month for about eight years, until she was about 18 years old." Some of the incidents occurred when she was sleeping in the same bed as her parents. Defendant also forced her to copulate him orally and he digitally penetrated her.

F. Section 1118.1

After the prosecution rested, defense counsel made a motion to dismiss counts 2 through 8, counts 12 through 21, and counts 22 through 32. The court granted the motion on count 8 and amended counts 4 through 7. The court denied the motion as to counts 12 through 32.

## III. Analysis

The issues on appeal concern counts 11 through 22, the 11 charges of lewd conduct involving N., committed when she was under 14 years of age.

There is some inconsistency between the testimony presented at the preliminary hearing and at trial. At the preliminary hearing, there was evidence of at least 208 lewd acts committed against N. when she was under 14. Additionally, there was evidence of unlawful sexual intercourse occurring between 10 and 20 times when N. was between the ages of 14 and 18. At trial, there was testimony that defendant had begun fondling N. at age 10 and engaged in sexual intercourse with N. twice a month for eight years when she was between the ages of 10 and 18.

On appeal defendant protests that he could not be convicted on counts 12 through 21 for lewd acts because the evidence at trial did not match the evidence at the preliminary hearing. (*People v. Dominguez* (2008) 166 Cal.App.4th 858, 866, 869-870; *People v. Graff* (2009) 170 Cal.App.4th 345, 366-367, citing *People v. Pitts* (1990) 223 Cal.App.3d 606, 902-908.) At the preliminary hearing, there was evidence of 208 lewd acts when N. was under 14 and 10 rapes after she became 14. At the trial, there was evidence of one lewd act at age 10 and evidence of 96 rapes occurring while she was under 14. Defendant argues that the under-age-14 rapes described at trial do not qualify as lewd acts because they were not part of the evidence at the preliminary hearing. In a related argument, defendant argues there was not sufficient evidence at trial to support defendant's convictions for committing 11 lewd acts against N. when she was under 14.

Defendants' contentions fail because there was evidence in both proceedings that defendant had committed at least 11 lewd acts, including intercourse, against N. when she was under 14. Specifically, detective Boemia testified at the preliminary hearing that, once or twice a week, when N. was between the ages of 10 and 14, defendant had fondled her breasts and genitals over and under her clothes. The evidence described at least 208 lewd acts. At trial, detective Pounds testified that defendant's fondling began when N. was 10 years old and that semi-monthly intercourse occurred between the ages of 10 and 14. Altogether, there was evidence at trial of at least 96 rapes when N. was younger than 14.

The lewd acts described in the preliminary hearing may have evolved into rapes. But a lewd act is, of course, an aspect of rape. Even though there is an inconsistency about whether intercourse with N. began before or after age 14, there was substantial evidence in both proceedings of defendant committing at least 11 lewd acts when N. was under 14.

We recognize defendant forfeited any challenge to the sufficiency of the evidence by not filing a motion to set aside the information. (§ 996; *In re Wells* (1967) 67 Cal.2d 873, 875; *People v. Burnett* (1999) 71 Cal.App.4th 151, 178-179.) But we determine a claim for ineffective assistance of counsel would fail because defendant cannot show the discrepancy in the evidence caused him prejudice or deprived him of a fair trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 646; *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

Defendant was charged with and convicted of committing 10 lewd acts against N. The evidence at the preliminary hearing gave fair notice to defendant that his liability

could encompass 208 lewd acts. The evidence of additional rapes occurring before N. was 14 could not have been a surprise, given that defense counsel had the police report prepared by detective Pounds which included the information about the rapes. Defendant had a reasonable opportunity to prepare and present his defense to counts 11 through 22. Finally, defendant offered no defense at trial other than to argue the prosecutor did not succeed in proving the offenses. Even if the evidence had been exactly the same at trial as the preliminary hearing, defendant would not have changed the style of his defense. Defendant was not prejudiced or deprived of his right to a fair trial.

## IV. Disposition

We affirm the judgment and order the abstract of judgment corrected to show an indeterminate term of 210 years to life, plus a determinate term of 92 years and eight months.

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s/Richli
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.